No. 02-1145

FILED
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In The

Supreme Court of the United States

WALTER R. MARSH and CHARLOTTE D. MARSH,

Petitioners,

v.

BOARD OF ZONING APPEALS OF CHESTERFIELD COUNTY and COUNTY OF CHESTERFIELD, VIRGINIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a property owner who has been given the opportunity to present to a local Board of Zoning Appeals ("BZA") his appeal of a notice of zoning violation issued by the local government's zoning administrator; to question and confront witnesses; and to discover all relevant documents in the possession of the local government's zoning administrator has received due process.

2. Whether the highest court of a state has the authority to interpret the state's constitution and to fashion an appropriate remedy if the state's constitution has been violated.

PARTIES TO THE APPEAL

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE APPEAL ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

A. Procedural Posture of the Case 1

B. Statement of Facts 2

REASONS FOR DENYING THE WRIT 5

A. The Petition for Appeal Does Not Identify a Compelling Reason for the Court to Grant Certiorari 5

B. Marsh Received a Full, Fair and Impartial Hearing Before the BZA and is Entitled to No Process Other Than The Process Which He Has Already Received 7

C. Marsh Cannot Use This Case to Collaterally Challenge a Previous Ruling of the Virginia Supreme Court Which Interprets the Virginia Constitution.....9

CONCLUSION.....11

TABLE OF AUTHORITIES

Page(s)

CASES:

Exxon Corp. v. Governor of Maryland,
437 U.S. 117 (1978) 6

Town of Madison v. Ford,
255 Va. 429, 498 S.E.2d 235 (1998)..... 5, 9, 10, 11

CONSTITUTIONAL PROVISION:

Va. Const. art. VII, § 7 5

STATUTES:

Va. Code § 15.2-2309, et. seq. 9

Va. Code § 15.2-2311..... 1, 3

Va. Code § 15.2-2312..... 8

Va. Code § 15.2-2314..... 2

Chesterfield County Code § 19-126(e) 3

RULE:

Sup. Ct. R. 10 5

ORDINANCE:

Chesterfield County Zoning Ordinance § 19-301 1

STATEMENT OF THE CASE

A. Procedural Posture of the Case.

The appellants, Walter W. Marsh and Charlotte D. Marsh (collectively "Marsh") own two parcels of land (the "Property") adjacent to the Chesterfield County Airport (the "Airport"). In 2000, Marsh began flying a lightweight type of glider aircraft, known as an "ultralight", from the Property and directly into the flight takeoff and landing pattern of the Airport.[1] Marsh's actions constitute an airport use under Section 19-301 of the Chesterfield County Zoning Ordinance.

Under the County's zoning ordinance, airports must have a conditional use permit. Marsh's property is zoned Agricultural and does not have a conditional use permit to engage in airport use. Accordingly, the County zoning administrator served a notice of zoning violation on Marsh advising him that he was violating the zoning ordinance. Marsh filed an appeal of the notice of zoning violation to the Chesterfield County Board of Zoning Appeals ("BZA") pursuant to Va. Code § 15.2-2311. The BZA heard the appeal on July 5, 2000 and upheld the notice of zoning violation.

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[1] The Airport is the 11th largest airport in the State of Virginia with 115 aircraft based onsite and over 75,000 "operations" or takeoffs and landings annually. The State Police maintain their helicopter evacuation and support unit at the Airport, where they base two public safety helicopters. (See BZA Tr., pp. 21-27).

Marsh appealed the BZA's decision to the Chesterfield County Circuit Court, a state trial court of record, pursuant to Va. Code § 15.2-2314. The trial court conducted a hearing on Marsh's appeal on March 8, 2001. In its letter opinion dated July 3, 2001, the trial court ruled pursuant to § 15.2-2314 that no evidence beyond the evidence already in the record of the BZA appeal was necessary for the court to review the BZA's decision and that the BZA's decision should be upheld as a matter of law. However, at an October 5, 2001 hearing for entry of the final order, counsel for Marsh contended that he had not had sufficient opportunity to argue the case orally. The trial court held another hearing for oral argument on February 25, 2002. At the conclusion of the second hearing, the trial court entered a final order upholding the decision of the BZA. Marsh appealed the decision to the Virginia Supreme Court. The Virginia Supreme Court declined to hear Marsh's appeal, finding no reversible error, and subsequently denied Marsh's request for a rehearing. Marsh then filed this appeal.

B. Statement of Facts

Beginning in February 2000, the County received complaints from users of the Airport that Marsh was flying "ultralight" aircraft from his Property which abuts the County Airport. The ultralight aircraft were taking off and landing on the Property using a flight path that caused the ultralights to fly directly into the takeoff and landing pattern for aircraft using the Airport. (BZA Tr., pp. 21-27). The County Planning Department determined, and Marsh

conceded, that Marsh's ultralight flights constituted the operation of an airport as defined in the County's zoning ordinance. (BZA Tr. pp. 11-16). Marsh's Property is zoned Agricultural and airports are not a permitted use in an Agricultural zoning district without a conditional use permit for an airport granted by the County's governing body, the Board of Supervisors. See County Code § 19-126(e). Marsh does not have a conditional use permit to operate an airport on the Property. (BZA Tr., pp. 27-34, 75-78). On April 7, 2000, the County's zoning administrator issued Marsh a notice of zoning violation informing him that to bring his Property in compliance with the Zoning Ordinance, he needed to either cease flying aircraft from it or obtain a conditional use permit from the Board of Supervisors. (BZA Record, Notice of Violation). Marsh did not apply for a conditional use permit. Instead, on May 16, 2000, Marsh appealed the notice of violation to the BZA pursuant to Va. Code § 15.2-2311.

At the BZA hearing Marsh was represented by counsel and was permitted to call witnesses and present evidence. (BZA Tr., pp. 41-42, 51, 73). Prior to the hearing, Marsh had indicated he might want certain County employees to testify at the hearing. All of these employees were present at the hearing and prepared to testify if Marsh had chosen to call them. (BZA Tr., pp. 2-4, 41-42). Marsh also introduced several exhibits that he obtained from his extensive discovery of the County's Planning Department records and Board of Supervisors' minutes. (BZA Record, Marsh Freedom of Information Act Requests and BZA Tr., pp. 51-64)

The County also introduced exhibits which established that Marsh's Property had never been zoned for airport use including: (1) minutes of the Board of Supervisors' September 24, 1969 meeting at which the Board rezoned the County's Airport property from agricultural to industrial with a conditional use permit; (2) zoning maps that showed the land which was actually rezoned for the County Airport; and (3) minutes of the comprehensive rezoning ordinance adopted by the County's Board of Supervisors on November 27, 1972, effective January 1, 1973, which rezoned the entire County and confirmed that Marsh's Property was zoned Agricultural and had no conditional use permit for an airport. (BZA Tr., pp. 30-35).

Nevertheless, Marsh contended that his Property actually had been rezoned on September 24, 1969, relying on contradictory and incomplete tax map information contained in the minutes of the 1969 Board of Supervisors' meeting. (BZA Tr., pp. 56-58). The BZA rejected Marsh's argument because the zoning maps which were prepared after the rezoning and were the only evidence which established the precise boundaries of the Airport rezoning showed that Marsh's Property was not rezoned for airport use. (BZA Tr., pp. 30-34; BZA record, zoning maps).

Marsh also contended that the 1972 comprehensive rezoning which re-confirmed that his property was not part of the Airport rezoning was invalid because the minutes of the comprehensive

rezoning did not reflect the vote of individual Board of Supervisors' members as required by Article VII, Section 7 of the Virginia Constitution. The BZA rejected this argument, relying on Town of Madison v. Ford, 255 Va. 429, 498 S.E.2d 235 (1998). (BZA Tr., pp. 65-69, 87-88).

At the conclusion of an approximately two-and-a-half-hour hearing, the BZA voted unanimously to uphold the decision of the zoning administrator to issue the notice of violation. The BZA's decision was upheld on appeal by the trial court, and the Virginia Supreme Court found no error in that decision and declined to hear Marsh's appeal.

REASONS FOR DENYING THE WRIT

A. The Petition for Appeal Does Not Identify a Compelling Reason for the Court to Grant Certiorari.

Review on a writ of certiorari is not a matter of right, but of judicial discretion, and a petition for a writ of certiorari will be granted "only for compelling reasons." Rule 10, Rules of the Supreme Court of the United States. The types of "compelling reasons" for which a petition will be granted are illustrated in Rule 10 and include: (1) a conflict among the United States courts of appeals, or between one or more courts of appeals and one or more state court of last resort on some important federal question; and (2) a decision by a state court or a United States court of appeals on an important federal question that has never been settled by this Court.

Marsh's Petition for a Writ of Certiorari does not identify any important federal question in which there is a conflict between federal appellate courts or between state and federal appellate courts. It also does not identify any important federal question that this Court has never settled. Despite Marsh's effort to invoke constitutional issues, this case is nothing more than a local zoning dispute arising out of the improper use of land. Federal courts do not sit as "super zoning boards" or as federal boards of zoning appeals. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 121 (1978).

The record establishes that Marsh had a full and fair opportunity to present his case to the BZA. Marsh also had the opportunity to appeal the BZA's decision to the Circuit Court of Chesterfield County, Virginia, and to the Supreme Court of Virginia in accordance with Virginia law. Marsh's due process challenge is nothing more than an effort to prolong an appropriately concluded state legal process simply because Marsh is unhappy with the State court's resolution of that process.

B. Marsh Received a Full, Fair and Impartial Hearing Before the BZA and is Entitled to No Process Other Than The Process Which He Has Already Received

Even though he was represented by counsel, had a full opportunity to present his case, received access to and copies of all County documents which he requested, and was given the opportunity to examine any County employee whom he wanted to question, Marsh complains that he was denied due process in the manner in which the BZA hearing was conducted. Marsh's complaint is not supported by the record.

First, the record establishes that Marsh was given an opportunity to examine every witness he wished to examine.[2] (BZA Tr., pp. 41-42, 51, 73). Second, despite Marsh's complaint that he was not allowed to subpoena the County witnesses he wanted to call, the record establishes that the County voluntarily made all witnesses whom Marsh requested

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[2] In reality, Marsh is complaining only that the BZA, in keeping with normal practices of boards of zoning appeals throughout Virginia, allowed each side to present its own case without interruption, which meant that Marsh's opportunity to confront and examine the County's witnesses came within the presentation of his own case, just as the County's opportunity to examine Marsh's witnesses occurred during the presentation of the County's case.

available for him to question at the hearing.[3] Accordingly, there was no reason for any subpoenas to be issued, and the Chairman of the BZA properly exercised the discretion granted to him by Va. Code § 15.2-2312 not to subpoena witnesses. (BZA Tr., pp. 41-42). Third, Marsh's contention that he was not given an opportunity to discover the County's documents is belied by the record which establishes that Marsh obtained numerous documents from the County through the Virginia Freedom of Information Act and that he introduced those very documents into evidence at the BZA hearing. (BZA Tr., pp. 51-64; and BZA Record, Marsh Freedom of Information Act requests).

In addition, Marsh cites no authority to support his claim that he has a due process right to have witnesses sworn, and the County is unaware of any such constitutionally mandated requirement. The BZA appeal process, as provided in Va. Code § 15.2-2312,

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[3] Even though the record establishes that all County witnesses whom Marsh wished to examine were present and available to testify, Marsh contends that the witnesses were only available for the benefit of the County and the BZA (Petition, pp. 6-7). In an effort to support his contention, Marsh cites a document reprinted as an Appendix to his Petition that is Marsh's counsel's notes during the hearing (Petition, pp. civ-cvi). Those notes, which are not part of the record in this case, are directly contradicted by the BZA transcript which is part of the record and which establishes that all witnesses who Marsh requested to examine were present and available to Marsh at the BZA hearing. (BZA Tr., pp. 41-42).

expressly grants discretion to the BZA Chairman to decide whether witnesses should be sworn. Marsh cannot complain about a denial of due process when the process he chose to use expressly provides that the BZA Chairman has the discretion not to swear witnesses.

The record establishes that the BZA followed the process set forth by Va. Code § 15.2-2309, et. seq. in all respects. Indeed, Marsh has not alleged that the BZA failed to do so. Instead, Marsh contends that irrespective of the statutory procedure prescribed for BZA hearings, he was entitled to have the BZA hearing conducted in the same manner that a hearing would be conducted if it took place in a court of law. Marsh has cited no constitutional authority for such a proposition, and the County has found no such authority.

C. Marsh Cannot Use This Case to Collaterally Challenge a Previous Ruling of the Virginia Supreme Court Which Interprets the Virginia Constitution.

In his second assignment of error, Marsh contends that the Virginia Supreme Court, which is not and cannot be a party to this action, violated his due process rights by deciding the case of Town of Madison v. Ford, 255 Va. 429, 498 S.E.2d 235 (1998) in a manner that he believes is inappropriate. Marsh offers no legal support for how this Court can reverse the five-year old precedent of the Virginia Supreme Court, nor does Marsh offer any explanation as to how or why Town of Madison denies his due process rights. It is certainly true that Town of Madison is fatal to Marsh's appeal,

because Town of Madison establishes the validity of the 1973 comprehensive rezoning of the County, which confirms that Marsh's property is not zoned to permit an airport use. But the fact that Town of Madison mandates the dismissal of Marsh's case does not mean that the Virginia Supreme Court has denied Marsh his due process rights.

In Town of Madison, the Virginia Supreme Court interpreted a provision of the 1972 Virginia Constitution which requires the minutes of the meetings of local governing bodies to record the vote of each member of the governing body on all ordinances, resolution and other legislative acts. In a 4-3 decision, the Virginia Supreme Court decided that minutes which recorded a "unanimous" vote of a local governing body did not comply with the requirement of the Virginia Constitution that the vote of each member of the governing body be recorded. Moreover, the Supreme Court determined that the consequence of failing to comply with the requirement was that the action of the governing body was rendered void *ab initio*. Recognizing the potential disruption that the ruling could have on local governments who thought they had been complying with the constitutional provision, the Supreme Court held in Town of Madison that its ruling was prospective only and would not affect the validity of ordinances adopted prior to the date of the Town of Madison decision, February 27, 1998.

The Virginia Supreme Court's interpretation of the Virginia Constitution in Town of Madison is precisely the type of decision that the Court was created to make, and the decision in no way implicates the United States Constitution or any other federal question that would invoke this Court's jurisdiction. Accordingly, Marsh's characterization of Town of Madison as a decision that "ignores and thus voids an unambiguous requirement of the Virginia Constitution" is specious. Marsh cannot characterize the Town of Madison decision as a violation of his due process rights merely because it interprets the Virginia Constitution differently from the way he would choose to interpret it or because the effect of the Supreme Court's interpretation is to confirm the validity of the County's 1973 comprehensive zoning ordinance.

CONCLUSION

Pursuant to rights granted to him under Virginia law, Marsh appealed the County's determination that his airport operation violates the County's zoning ordinance to the local BZA. The BZA's proceedings complied in all respects with the requirements of Virginia law and the BZA rejected Marsh's contentions and denied his appeal. Marsh cannot re-characterize this state law zoning dispute as a federal constitutional question simply because he is unhappy with the BZA's decision or the decisions of the Chesterfield County Circuit Court and the Virginia Supreme Court upholding the BZA's decision. Marsh is inviting this Court to become involved as a "super board of zoning appeals" in the kind of local land use dispute that is decided on a daily basis by local zoning

administrators and zoning boards in accordance with established statutory procedures. The respondents respectfully request that the Court deny Marsh's Petition for Writ of Certiorari.

Respectfully submitted,

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